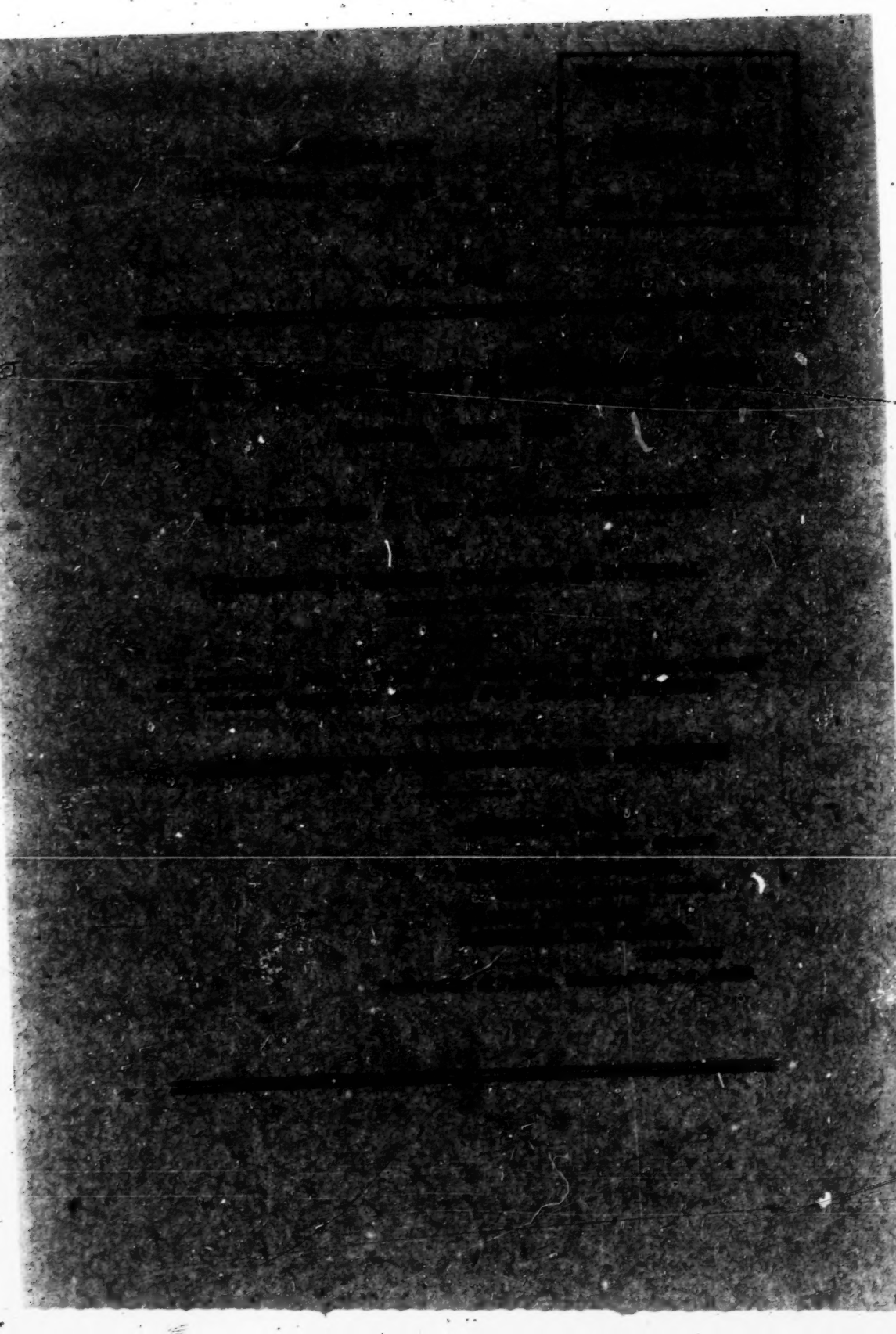

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 643

WILLMUT GAS & OIL COMPANY, PETITIONER

v.

EUGENE FLY, FORMER COLLECTOR OF INTERNAL REVENUE, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In Section 732 (Pet. A10–A11) of the Second World War Excess Profits Tax Law (Section 710, *et seq.*, of the 1939 Internal Revenue Code, 26 U.S.C. 1952 ed.), Congress established a specialized procedure vesting in the Tax Court the exclusive jurisdiction to review questions under the so-called "abnormalities" or "relief" provisions of the law, i.e., Sections 711(b)(1) (H) through (K), 721, and 722. Section 732(c) expressly prohibited the review by any court other than the Tax Court of the Commissioner's determination on any of the relief questions. In the present suit for refund, the petitioner sought review in the district court—instead of in the Tax Court—of the Commissioner's partial

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disallowance of the relief it had claimed under Section 711(b)(1)(J).[1] Observing the prohibition of Section 732(c), the district court dismissed the action for lack of jurisdiction.[2] (Pet. A1–A3.) The court of appeals affirmed. (Pet. A4–A8.)

The decision below is in keeping with the decisions of all the courts which have had occasion to consider Section 732(c). In all, the courts of appeals for eight different circuits have uniformly and consistently applied the prohibition of Section 732(c) as foreclosing even appellate review of the Tax Court's decision of such questions.[3] This Court

[1] In broad terms, the excess profits tax was imposed on the wartime income of corporations in excess of their "normal" income during a pre-war "base period" (see §§ 710, 712, 713). Several adjustments were provided for in computing base-period income in order to grant relief from the distorting effects of unusual events occurring during the base-period years. Section 711(b)(1)(J), invoked by petitioner, authorized the elimination, in the computation of base-period income, of "abnormal" deductions taken in those years, subject to prescribed conditions and limitations.

[2] In the only other case in which a taxpayer has sought review in a district court of the Commissioner's action on a relief question, the court declined to entertain jurisdiction. *May Broadcasting Co.* v. *United States* (S.D. Iowa) decided March 15, 1952, 44 A.F.T.R. 1022, 1027, reversed on other issues, 200 F. 2d 852 (C.A. 8th).

[3] Second Circuit: *United States Rubber Co.* v. *Commissioner*, 274 F. 2d 307, certiorari denied, 363 U.S. 827; *Crowell-Collier Pub. Co.* v. *Commissioner*, 259 F. 2d 860, certiorari denied, 358 U.S. 928; *George Kemp Real Estate Co.* v. *Commissioner*, 182 F. 2d 847, certiorari denied, 340 U.S. 852. Third Circuit: *Hewitt-Robins, Inc.* v. *Commissioner*, 282 F. 2d 868; *L. E. Carpenter & Co.* v. *Commissioner*, 264 F. 2d 230; *Colonial Amusement Co. of Philadelphia* v. *Commissioner*, 173 F. 2d 568. Fourth Circuit: *Standard Hosiery Mills* v. *Commissioner*,

has in turn repeatedly denied certiorari notwithstanding a wide variety of assertions of violation of constitutional rights.[4]

The crux of the petitioner's contentions (Pet. 14–21, 35–48) is that it cannot be compelled to assert its right to the relief in question only in the Tax Court, without depriving it of property without due process. The court below correctly held (Pet. A6, A7) that the due process requirement was satisfied by the provision permitting review in the Tax Court. The right of Congress to limit to the Tax Court the review of the Commissioner's action on relief questions under the World War II excess profits tax law—and to take away the further review by appellate courts normally available in ordinary Tax Court cases—has been repeatedly recognized.[5] Actually, Congress could have limited the right to relief even more, as it did under the excess profits

249 F. 2d 469. Fifth Circuit: *Brown Paper Mill Co.* v. *Commissioner*, 255 F. 2d 77, certiorari denied, 358 U.S. 906; *A. B. Frank Co.* v. *Commissioner*, 211 F. 2d 497. Sixth Circuit: *Bradford Machine Tool Co.* v. *Commissioner*, 260 F. 2d 950, certiorari denied, 359 U.S. 909; *Patent Button Co.* v. *Commissioner*, 256 F. 2d 726. Seventh Circuit: *Pure Transportation Co.* v. *Commissioner*, 292 F. 2d 267. Ninth Circuit: *Puget Sound Pulp & Timber Co.* v. *Commissioner*, 277 F. 2d 803, certiorari denied, 364 U.S. 831; *Helms Bakeries* v. *Commissioner*, 263 F. 2d 642, certiorari denied, 360 U.S. 903; *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596, certiorari denied, 332 U.S. 767. Tenth Circuit: *Colorado Milling & El. Co.* v. *Commissioner*, 205 F. 2d 551.

[4] E.g., the *James F. Waters*, *Brown Paper*, *Crowell-Collier*, *Helms Bakeries* and *Puget Sound* cases, *supra*.

[5] See the *James F. Waters*, *Standard Hosiery*, *Brown Paper* and *Patent Button* cases, *supra*.

tax law of the First World War, under which the Commissioner's determination as to relief was final. See *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; and *Welch* v. *Obispo Oil Co.*, 301 U.S. 190.

The decision below is correct. There is no conflict of decisions, and the case clearly presents no question warranting review by this Court, particularly at this late date, when nearly all relief cases under the Word War II law have been disposed of.

The petition should, therefore, be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

HARRY MARSELLI,
BENJAMIN M. PARKER,
Attorneys.

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